

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STANLEY DUANE BURDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

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I

STATEMENT OF JURISDICTION

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On July 7, 1965, appellant was indicted in two counts by the Federal Grand Jury for the Southern District of California, Central Division, for the concealment and sale and facilitation of sale of heroin in violation of Title 21 United States Code, Section 174 [C. T. 2]. <sup>1/</sup> Following a court trial before the Honorable E. Avery Crary, United States District Judge, from August 18, 1965, to August 19, 1965, appellant STANLEY DUANE BURDEN was found guilty of both counts.

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<sup>1/</sup> "C. T. " refers to Clerk's Transcript.





Appellant was convicted and sentenced on September 28, 1965, to the custody of the Attorney General for five years on each count, the sentences to run concurrently [C.T. 15].

Appellant filed, on September 28, 1965, a Notice of Appeal [C.T. 18].

The District Court had jurisdiction under the provisions of Title 21, United States Code, Section 174, and Title 18, United States Code, Section 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTE INVOLVED

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Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever ... knowingly ... receives,  
conceals, buys, sells, or in any manner facilitates  
the transportation, concealment, or sale of any ...  
narcotic drug after being imported or brought in,  
knowing the same to have been imported or brought  
into the United States contrary to law, "

shall be guilty of an offense against the laws of the United States.



### III

#### QUESTIONS PRESENTED

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1. Whether the evidence was sufficient to convict appellant.
2. Whether appellant was entrapped.

### IV

#### STATEMENT OF FACTS

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On January 25, 1965, an informant of the Federal Bureau of Narcotics placed a call to appellant at appellant's place of employment [R. T. 5]. <sup>2/</sup>

The informant told appellant he was interested in purchasing a quarter or half ounce of heroin and asked "if he could make the buy for me" [R. T. 6]. Appellant stated that he would have to call someone, and five minutes later returned the call and stated "he called his connection and that the buy could be made" [R. T. 6-7]. Appellant stated he was leaving work at 5:00 P. M. and the informant stated he would be at appellant's house at 8:00 P. M. [R. T. 7].

At about 7:00 P. M. on January 25, 1965, three agents of the Federal Bureau of Narcotics met the informant at his house and Agent Sergio Borquez searched the informant's person and

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<sup>2/</sup> "R. T. " refers to Reporter's Transcript.



automobile for narcotics and money [R. T. 8]. The search proved negative [R. T. 34]. The informant drove his car to appellant's residence with Agent Borquez in the car [R. T. 8].

Upon meeting with appellant, appellant gave directions as to how to get to Pasadena, California [R. T. 9]. After arriving at the Keg Bar appellant went to phone the connection [R. T. 9]. Appellant returned from the phone, stated "the connection wasn't home" and borrowed the informant's car to see if his connection was home [R. T. 9]. Appellant returned in approximately fifteen minutes and stated the connection was not home [R. T. 10]. After a short time appellant, the informant, and Agent Borquez, proceeded, in the informant's vehicle, to the area of Raymond and Summit Streets in Pasadena, and appellant recognized the source's car in a driveway and said the connection was home [R. T. 10].

After parking the car, the informant handed Borquez \$40.00, Borquez added \$80.00 to the amount, and handed the total to appellant [R. T. 10] after appellant stated, "Give me the money" [R. T. 36-38]. Appellant left the vehicle, with the money, and disappeared around a corner [R. T. 10].

After ten minutes appellant returned with two condoms, handed one to the informant, and kept one in his hand [R. T. 10-11]. The informant then handed one prophylactic, with its contents to Borquez [R. T. 11]. The trio returned to appellant's residence [R. T. 12]. On the way to appellant's residence, appellant stated to Borquez, "Keep it handy, where you can swallow it in case we



get stopped" [R.T. 36-7]. Borquez, during the ride to appellant's residence complained about the weight of the heroin, and appellant stated, "Well, when we get to the apartment I will give you some more" [R.T. 38-9].

Upon returning to appellant's apartment, appellant removed from the second condom some heroin, handed the residue to Borquez, and then injected himself [R.T. 13-14, 39].

Borquez asked appellant how he could get in touch with appellant if he [Borquez] wanted to buy more heroin [R.T. 39-40]. Appellant gave Borquez a card, circled a number on the card, and said, "You can get in touch with me here whenever you want to purchase some more heroin" [R.T. 39-40].

On January 25, 1965, the informant did not tell appellant that he [the informant] needed a "fix," and specifically told appellant that he wanted to buy it for sale [R.T. 29-30].

After the sale on January 25, 1965, Agent Borquez called appellant several times and appellant stated that he had heard Marmolejo [the informant] was working with the police so that he did not want to sell any more heroin to Borquez [R.T. 52].

Appellant testified at the trial, and among other things said that he told the informant on January 25 that he would see if he could find a source where he could "get something" [R.T. 107]. He took the money [R.T. 109]. He testified that there is an understanding among users of narcotics that if one assists in the obtaining of narcotics the buyer will give you a share [R.T. 110]. He also testified that he had obtained heroin from the "connection"





here in the past [R. T. 114].

V.

ARGUMENT

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A. THE EVIDENCE WAS SUFFICIENT TO  
SUSTAIN CONVICTION.

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The statement of facts, above, shows that an informant called appellant on January 25, 1965, and told him he wanted some heroin for sale. Arrangements were made to meet, and the informant, in the company of an Agent of the Bureau of Narcotics, met with appellant, drove to a location in the area of Pasadena, and the agent gave appellant \$120. Shortly thereafter appellant turned over two prophylactics containing heroin after he had taken some for his own use.

Appellant argues that he was merely the procuring agent of the buyer, and, therefore, cannot be convicted of facilitating the sale or concealment or transportation of heroin. Such is not the law of this Circuit. Both Vasquez v. United States, 290 F.2d 89 (9th Cir. 1961); and Bruno v. United States, 259 F.2d 8 (9th Cir. 1958); stand for the proposition that "facilitation," in its legal meaning, includes the acts committed in the instant case. It is problematical whether this Circuit declines to follow the cases cited by appellant, or politely ignores them, but they are not the law of this Circuit. In United States v. Simons, 374 F.2d 993 (7th Cir. 1966), there appears the following cogent discussion. In



electing to follow the Ninth Circuit in Bruno, supra, the Court said at 995:

"Literally, the first clause of Section 174 covers the importation of narcotics, and the second clause the offense of, among others, the buying and selling of the imported drugs. The third clause effectually covers any other actor in the sale besides the buyer and seller. The clause does not distinguish on which side this actor works.

"It makes no difference therefore whether the middleman . . . is acting for himself or for the buyer or the seller.

"If he makes the sale easier between a seller and a buyer and does so with scienter, he is guilty of a crime. If in order to convict a middleman, it is necessary to prove beyond a reasonable doubt his association with the seller, it seems to us that the efficacy of the facilitation clause of section 174 is nullified. Normally the principal seller in these cases is the faceless, nameless 'connection.' "

#### B. APPELLANT WAS NOT ENTRAPPED

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In reference to the entrapment argued at the trial level,

Judge Crary made the following observations at R.T. 177:



"Mr. Marmolejo called Mr. Burden relative to the purchase of heroin. You said he said he needed it. Well, I will assume for the purposes of discussion he did, although I don't recall that he needed it.

"Burden didn't object. He made no pretense or refusal to get the heroin. In fact, I don't think Mr. Burden testified there was any refusal or any pretense or refusal on his part.

"It took no urging by the informer to get Mr. Burden to get the narcotics and to arrange for it. He didn't have any, of course, but he knew where he could get it.

"Mr. Burden, in my judgment, didn't display any unwillingness.

"He gave Mr. Borquez his card and he circled the telephone number on the card, and according to the testimony, as I recall it, Mr. Burden told Mr. Borquez if he wanted more heroin, why, to call him.

"Mr. Burden took a portion of the heroin for himself. That to me does not indicate entrapment."

Appellant argues that the informant said he needed heroin and therefore entrapment occurred. Aside from the observations of Judge Crary, the informant did not say he "needed a fix", but



did state he wanted the heroin for sale [R. T. 29-30]. Of course, on appeal, the informant must be believed, and, therefore, since appellant's statement of "need" is discounted, and also the only evidence remotely supporting entrapment, the issue of fact was properly determined.

## VI

### CONCLUSION

For the above reasons, the judgment should be affirmed.

Respectfully submitted,

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